Supreme Court of the United States,

OCTOBER TERM, 1898.

No. 232.

ROBERT M. WHITE, PLAINTIFF IN ERROR

versus

AUGUST F. LEOVY ET ALS., DEFENDANTS IN ERROR.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Brief on Behalf of Plaintiff in Error.

The plaintiff, alleging himself to be the owner and in lawful possession of all the unsurveyed marsh, west of lots fronting on the right bank of the Mississippi, except section 16, in township 22 south, range 31 east, southeastern, west of river land district, containing 3840 acres, according to the official plat of survey, instituted suit against defendants, charging them with slandering his title to this property.

Defendants, justifying averring a superior title and alleging possession of part of the land claimed by plaintiff to be included in his patent, averred ownership and possession thereof, and reconvened, setting up title to certain fractional sections of the land within the township previously patented to plaintiff. The defendant thereby became plaintiff in a petitory action, or what is known at the common law as an action of ejectment. (Gilman vs. Poindexter, 10 How. 25); "and must succeed or fail upon the strength of his own title and "not upon the weakness of his adversary's." Clarkston vs. Vincent, 32 Ann. 613; Dalton vs. Wickliffe, 35 Ann. 355; Gay vs. Ellis, 33 Ann. 249; Sully vs. Spearing, 40 An. 558.

Thus, it appears, that the positions of the parties have, by the pleadings, become reversed—the defendant, Henry J. Leovy, takes the place of the plaintiff in a petitory action or action of ejectment, the plaintiff, White, becoming the defendant in such action.

When the case was called for trial in the court of the first instance, the plaintiff filed an exception and demurrer to the answer and plea in reconvention set up by defendants, raising certain federal questions.

This exception is as follows:

"Now, into this Honorable Court comes Robert M. White, plaintiff in the above entitled and numbered cause, by his undersigned counsel, and for exception and demurrer to the answer and plea in reconvention herein filed by defendant, says:

"1st. That the official plat and survey of G. F. Connelly, United States Surveyor, made in 1836, under the authority of the United States Government, by and in accordance with which plat and survey, the lands owned by the plaintiff and described in the patent annexed to the supplemental petition filed in this cause, were patented and granted to the State of Louisiana by the United States Government, and subsequently sold and patented by the State of Louisiana to the said Robert M. White, plaintiff, cannot be questioned or impeached by defendant in this suit, and this court is wholly without jurisdiction, *ratione materiæ*, to inquire and determine whether said official plat or survey is erroneous.

"2d. That the patent issued to the said Robert M. White, plaintiff, cannot be questioned or impeached by defendant or any private individual, but only at the suit of the government.

"3d. That the United States Government, as the owner of the unsurveyed sea-marsh, mentioned and referred to in the survey, plat, field notes and description of G. F. Connelly, United States Surveyor, made in 1836, adjacent to the sea-shore, known as West Bay, and as sovereign acquired all the alluvion made by accretion to said land between the years 1836 and 1850, and when said lands were granted by the United States Government and the State of Louisiana, as grantee of the United States Government, and the said R. M. White, plaintiff, as patentee of the State of Louisiana, acquired all of said lands, as well as the accretions which were added thereto as they were at the time they were granted by the United States to the State of Louisiana.

"4th. That the grant made under the acts of Congress, approved March 2d, 1849, and September 28th, 1850, known as the "Swamp Land Act," passed the title of the United States Government to all the unsurveyed marsh west of lots fronting on the right bank of the Mississippi, in township 22, south range No. 31 east, in the southeastern, west of river, land district, not only as it was at the time of the survey by G. F. Connelly in 1836, but as it was at the date of the said grants in 1849 and 1850, so that the United States did not retain any interest in any accretion formed between the survey in 1836 and the date of the grant to the State of Louisiana; and the said R. M. White, plaintiff herein, acquired all of said land in township No. 22,

south range No. 31 east, in the southeastern, west of river, land district, as they were at the time they were granted by the United States Government to the State of Louisiana, as aforesaid.

"5th. That the patent issued by the State of Louisiana to the said R. M. White, plaintiff herein, No. 4058, of 'all the unsurveyed marsh west of lots fronting on the right bank of the Mississippi, in township No. 22, south range No. 31 east, in the southeastern, west of river, land district,' evidences a contract between the State of Louisiana and the said R. M. White, plaintiff herein, and the State of Louisiana could not subsequently lawfully grant unto the defendant, Henry J. Leovy, or others, any part or portion of the lands in said township, and by so doing, as defendant pretends, has attempted to impair the obligation of the contract between the State of Louisiana and the said R. M. White, plaintiff herein, and deprive him of his property without due process of law, in violation of the Constitution and laws of the United States.

"6th. That the patents of lands issued to the defendant, Henry J. Leovy, referred to in the answer and plea in reconvention herein, filed by him, were made, issued and delivered subsequent to the said patent No. 4058, issued to R. M. White, plaintiff herein, are embraced in and covered by the patent previously issued to the plaintiff. Therefore, the said patents so subsequently issued to the defendant by the State of Louisiana, are illegal, null and void, being for land embraced within the patent of plaintiff; and the State of Louisiana in issuing said patents to the defendant, Henry J. Leovy, sought to impair the obligation of the contract entered into by her with the said R. M. White, plaintiff herein, and sought to deprive him of his property without due process of law, in violation of the Constitution and laws of the United States.

"7th. That all the acts and doings of the State of Louisiana and of defendant, Henry J. Leovy, hereinabove recited, are contrary to and violative of the Constitution and laws of the United States.

"Wherefore, plaintiff and appearer prays that this exception be filed; and he moves the court to strike out all that portion of defendant's answer and plea in reconvention, alleging error in the official plat and survey made by G. F. Connelly in 1836, or any change in the nature and character of the unsurveyed marsh west of lots fronting on the right bank of the Mississippi, in township 22, south, range No. 31 east, in the southeastern, west of river, land district, by accretion or otherwise, and also all averments of fraud contained in said answer and plea in reconvention, and also all averments of defendant setting up title to any of said lands under patents subsequent in date to that of R. M. White, plaintiff; and that all evidence in support of said averments be excluded, rejected and disallowed for the reason above recited.

"And he prays that this exception be sustained, and for general relief."

The district judge sustained this exception and motion to strike out.

After hearing the evidence, the judge of the district court for the parish of Plaquemines rendered judgment in favor of plaintiff and against defendants, from which defendants appealed to the Supreme Court of Louisiana. There, the judgment of the district court was reversed, plaintiff's demand rejected, and judgment rendered in favor of the defendants.

The opinion of the Supreme Court of Louisiana covers twenty-nine printed pages of the reports. See Robert M. White vs. August F. Leovy et als., 49 An. 1660, *et seq.*

From this decision the plaintiff sued out this writ of error.

ASSIGNMENT OF ERRORS.

1. That the court erred in holding that the survey of G. F. Connelly, United States Deputy Surveyor, made in 1836, under the authority of the United States Government, by which the land patented to the plaintiff, and granted to him by the State of Louisiana, could be questioned or impeached by defendants, or that any subsequent survey of said land could be authorized or recognized by the State of Louisiana after she had parted with her title thereto by issuing her patent to the plaintiff. That there was thus drawn in question the validity of a statute or of an authority exercised under the United States, and the decision of this honorable court is against their validity.

2. That the court erred in holding that the State, after she had agreed by Act 336, of 1850, to accept the donations of swamp lands under the acts of Congress, according to the field notes and surveys thereof made by the United States Deputy Surveyor, and after she had granted to the plaintiff said lands, according to said official survey and field notes could subsequently authorize or recognize any other survey and issue other patents to Henry J. Leovy, defendant, according to a subsequent survey.

That there was thus drawn in question the validity of a statute of the State of Louisiana, or an authority exercised under said State on the ground of their being repugnant to the Constitution and laws of the United States, and the decision of this honorable court is in favor of their validity.

3. That this court erred in refusing to hold that the United States Government (as the owner of the unsurveyed sea marsh in township 22, south, range 31 east, southeastern, west of river, land district, mentioned and referred to in the survey and field notes of said

G. F. Connelly, United States Deputy Surveyor, made in 1836, adjacent to the seashore, known as "West Bay," acquired all the alluvion made by the accretions to said land between the years 1836 and 1850; and when the said lands were granted by the United States to the State of Louisiana, under the acts of Congress, known as the Swamp Land Acts; and in refusing to hold that plaintiff, as patentee of the State, acquired all of said lands, as well as the accretions which were added thereto, as they were at the time they were granted by the United States to the State. That there was thus drawn in question the validity of the statutes of or an authority exercised under the United States, and the decision of this honorable court is against their validity.

4. That the court erred in refusing to hold that the grant made under the acts of Congress, known as the Swamp Land Acts, passed the title of the United States Government to all the unsurveyed sea-marsh west of lots fronting on the right bank of the Mississippi, in township 22 south, range 31 east, in the southeastern, west of river, land district—according to the official survey of said lands, not only as they were at the time of the said survey, in 1836, by G. F. Connelly, United States Deputy Surveyor, but as they were at the date of said grants in 1849 and 1850; and in refusing to hold that the said Robert M. White, plaintiff herein, acquired all of said lands as well as the accretions which were added thereto, according to the official survey in the State Land Office, as they were at the time they were granted by the United States to the State of Louisiana aforesaid, except the sixteenth section. That plaintiff's right to said alluvion is a vested right inherent in the property itself which the State could not divest. That there was thus drawn in question the validity of a statute and of an authority exercised under the State of Louisiana, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision of this honorable court is in favor of their validity.

5. That the court erred in holding that the patents granted by the State of Louisiana to Henry J. Leovy, defendant, did not cover any parts or portions of the land in township 22 south, range 31 east, in the southeastern, west of river, land district, previously sold and patented by the State to plaintiff, under the patent No. 4058, of all the sea marsh, west of lots fronting on the right bank of the Mississippi river, in said township, except the 16th section. That there was thus drawn in question the validity of a statute of the State of Louisiana, or of an authority exercised under the State of Louisiana, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision of this honorable court is in favor of their validity.

6. That the court erred in holding that the State of Louisiana,

by issuing patents to the defendant, Henry J. Leovy, for parts and portions of the land in township 22 south, range 31 east, in the southeastern, west of river, land district, which the said State previously granted to Robert M. White, did not violate the Constitution of the United States, in that it did impair the obligation of the contract entered into by the State of Louisiana with the said Robert M. White evidenced by the patent No. 4058, issued to him by said State.

7. That the court erred in holding that the issuance of patents to defendant, Henry J. Leovy, for parts or portions of the lands in township 22 south, range 31 east, in the southeastern, west of river, land district, by the officers of the State of Louisiana, claiming to act under a statute of said State, viz: Act No. 75, of the General Assembly of the State of Louisiana, of the year 1880, approved April 7th, 1880, previously sold to Robert M. White by the said State of Louisiana, under patent No. 4058, without notice, hearing or trial, is not violative of the 14th amendment to the Constitution of the United States, prohibiting a State from depriving any person of his property without due process of law.

The township 22, the whole of which is claimed by plaintiff, with certain exceptions mentioned in his patent, was surveyed by G. F. Connelly, United States Deputy Surveyor, in 1836, under the authority of the United States Government. Only the exterior or township lines were run, the sectional lines within the township have never been run by any recognized authority.

In Heath vs. Wallace, 138 U. S. 584, it was held that:

"After the United States surveys had been made, there was no necessity for any further survey by the State in order to locate the swamp lands. In fact, there could be no State survey after that date of any recognized force."

In 1836, the Mississippi river broke through its banks at what is known as the "Jump," about four miles north of the upper boundary of township 22, and the annual overflows and sedimentary deposits of this stream have since continued to elevate the marsh land contained within this township. In 1852, it appears, that the Secretary of the Interior, in obedience to the Swamp Land Act of 1849, approved this township to the State of Louisiana. This approval is as follows:

"The approval by the Commissioner of the general land office of Mississippi swamp and overflowed land, under act of Congress, approved March 2, 1849, and which approval bears date May 6, 1852, shows all the unsurveyed marsh west of lots fronting on the right bank of the Mississippi river, in township 22 south, range 31 east, except the 16th section, estimated area thirty-eight hundred and forty acres (3840)." R., p. ——.

The approval of this township, which is a partial or fractional one, was never surveyed, but *the area was estimated.*

The approval of this entire township to the State, with the exception of the 16th section and the front lots by the United States Government, shows that it contains an *estimated area of 3840 acres*, the exact number mentioned in the patent obtained by White from the State of Louisiana in 1890. The acreage of this character of land—sea-marsh—has always been estimated. In Martin vs. Marks, 97 U. S. 345, this court held that the area in that case, as in this, was estimated.

It will be noted that White first applied to the register to purchase the whole of the unsurveyed marsh in this township. The register received from him the purchase price with the understanding that he was to inquire as to White's right to enter this land, and that this question should be submitted to the Attorney General for his opinion (see register's receipt offered in evidence by plaintiff).

Section 9 of the Act 75, of 1880, provides that—

"The Attorney General of the State of Louisiana shall give his opinion and counsel to the said register, whenever requested, in any manner pertaining to the duties or business of the said register's office."

It was afterwards that the patent to this "unsurveyed marsh" was issued to White, showing that the Attorney General, the law officer of the Land Department, had advised and concurred in its issuance.

Turning to the decisions of the Secretary of the Interior of the United States, we find in Vol. 5, Dec. Sec. Int., pp. 514-520, and on review of the same case, on page 598 of the same, the honorable Secretary says:

"From the foregoing, it is clear that the State of Louisiana elected to make the field notes of survey the basis of the adjustment of both of said grants. Indeed, as appears in the quotation from the argument of counsel in said decision of March 25, 1887, 'the field notes made by the United States Deputy Surveyor were agreed upon as the basis as being a substantial compliance with the law;' and it would seem that the State, after the lapse of nearly forty years, is *estopped from denying such election*, if she were so disposed."

Again, the Commissioner of Public Lands of the United States, on November 21, 1885, in Vol. 4, Dec. Sec. of Int., pp. 524 and 525, held: "The rule in force from the beginning has been that a State having elected to take swamp land by field notes and plats of survey is bound by them, as is also the government." See Sec. decision, 1 Lester, 553; *Id.*, 571, C. L. O. 149 and September 19, 1879.

"The State of Louisiana elected under her own motion to have the swamp land grant finally adjudicated in this manner; the State is bound, and also the government, by what the field notes disclose. If they show swamp lands, such lands will be listed, and the uniform acquiescence of the Legislature shows the State as recognizing it." (See, also, Act 336, of 1850, page 250.)

The State has patented to White the same land acquired by her

from the United States under Connelly's survey and field notes. The fact that the area or acreage is estimated does not in any way invalidate the title acquired by White from the State.

In Vol. 8, p. 65, Decisions of the Department of Interior, relating to public lands, it is held that:

"Under the regulations of the department which allowed selections of unsurveyed swamp lands to be made and certified by *estimated areas*, where an entire body of land was swamp and overflowed, and the uniform ruling of the department hitherto, it is held that selections so made and reported to the general land office prior to the passage of the act of March 3d, 1857, were confirmed by said act and the title thereto made complete.

"If the lands so selected and reported can be designated in the patent by metes and bounds, or by any other accurate description which clearly indicates and describes the particular land selected, the want of survey will be no objection to the issuance of patent." And at page 369 it was held that:

"Selections may be made of *unsurveyed swamp lands by estimated areas* if the entire body of land is unquestionably of the character granted, and the selection does not conflict with the claims of others."

In Vol. 18, page 26, of the Decisions of the Department of the Interior relating to public lands, it was held that:

"Patents under the grant of swamp lands may issue to the State of Florida covering 'the Everglades,' upon an *estimated area*, and designated by metes and bounds, excepting therefrom all islands and bodies of water not subject to the terms of the grant."

And in Vol. 19 of the same decisions, p. 251, it is held that:

"It appearing that the *unsurveyed body* of land lying within the State of Florida, known as the Everglades is, in fact, swamp, and that a survey thereof is not practicable, patent may issue to the State under the swamp grant upon an *estimated area* designated by metes and bounds, the State to furnish a meander survey of said 'Everglades,' accompanied by satisfactory proof that said meander line does not include within its limits lands not of the character granted."

Hence, we say that the grant made by the United States to the State of Louisiana, under the act of 1849, of this unsurveyed sea-marsh, according to the estimated area, is perfect, good and valid. The Supreme Court of the United States has so held in the case of Morris vs. Marks (*supra*), where the area was estimated, and this court has recognized the validity of a similar patent in State of Louisiana vs. Buck, 46 An., p. 656.

In Newsom vs. Pryor, 7 Wheaton, page 8, Chief Justice Marshall, in delivering the opinion of the court, said:

"It is apparent that a survey was not made in fact, but that, after making a beginning corner, the surveyor made out and returned a plat, which he supposed would comprehend the land intended to be acquired. *It is now too late to question the validity of grants made on such plats and certificates of survey. From the extraordinary circumstances of the country, they were frequent, and, in consequence of those circumstances, have received the sanction of courts. An immense number of*

titles, believed to be perfectly secure. depend upon the maintenance of such grants. The extent of the mischief which would result from unsettling the principle cannot be perceived, and is certainly too great now to be encountered. The patent, therefore, must be considered as if the survey had been actualiy made."

This being a sale of unsurveyed sea-marsh, contained in a fractional township, is in accordance with Secs. 7 and 14 of Act 75, of 1880. Upon the receipt of the Register of the State Land Office as receiver, the Governor only has the absolute power to issue patents to land purchased by patentees from the State. The section referred to by defendants' counsel merely authorizes the receiver of the land office to give a receipt for the land purchased by township sections and ranges.

Under the provisions of Act 7, of 1880, and especially Secs. 7 and 14, the Governor has as much power to issue a patent for land contained in a fractional township as he has the right to issue a patent for land contained in a fractional section.

This sea marsh was acquired from the United States under the provisions of the acts of Congress of 1849. The State of Louisiana, by Act No. 336, approved March 21st, 1850, p. 250, accepted of this grant, and specially provided: "That *no contract shall be made for the survey* of any of said lands that can be selected and listed to the satisfaction of the proper department of the government of the United States, by the *field notes* on file in the Surveyor General's office." It was under the field notes of the survey made by Connelly, wherein all the unsurveyed sea-marsh in township 22 south, range 31 east, was *estimated* at 3840 acres, exclusive of the front lots and the 16th section, that this land was approved to the State. See approval by Secretary of Interior, offered in evidence, bearing date, 1852.

And by section 5 of Act 104, E. S., General Assembly of Louisiana, 1871, it was made the duty of the Registrar to request the Surveyor General of the United States for Louisiana to have such surveys made thereof as may be necessary, in accordance with the existing laws and regulations governing such work.

White purchased from the State of Louisiana everything that the State acquired from the United States—that is, the whole of this township, except the front lots and section 16. The grant in this case is similar to that in Martin vs. Marks, 97 U. S. 345, where the area was estimated, instead of being established by an actual survey upon the ground. True, it is, that the corners have been established in this township by Connelly, so that the lines can be run in conformity with White's patent.

The survey made of this township is in conformity with the provisions of Sec. 2488 of the Revised Statutes of the United States, which

require that "in segregating large bodies of land, notoriously and obviously swamp and overflowed, it shall *not* be necessary to subdivide the same, but to run the exterior lines of such body of land."

There is no way of escaping from the fact that Leovy has purchased and obtained patents for sections and fractional sections in township No. 22 south, range 31 east, covered by White's patent, issued three years previously. In a case similar to this, this court took occasion to say:

"It is well settled that the State could have impeached the title thus conveyed to the canal company only by a bill in chancery to cancel or annul it, either for fraud on the part of the grantee, or mistake or misconstruction of the law on the part of its officers in issuing the patent, and *until so cancelled* or annulled *it could not issue to another* party *any valid patent for the same land.* * * * This is also the view taken of the question in Michigan vs. Flint & Pere Marquette Railroad, 89 Michigan, 481, 494. In that case the prior patent of the State was held to estop it from subsequently asserting title to the parcel of land conveyed, while its patent for the same land is outstanding. But whether there is any technical estoppel in the ordinary sense or not, *it cannot be maintained that the State can issue two patents, at different dates, to different parties, for the same land, so as to convey by the second patent a title superior to that acquired under the first patent.* Neither can the second patentee, under such circumstances, in any action at law be heard to impeach the prior patent for any fraud committed by the grantee against the State, or any mistake committed by its officers acting within the scope of their authority, and having jurisdiction to act and to execute the conveyance sought to be impeached." Chandler vs. Calumet and Hecla Mining Co., 149 U. S., pp. 93 and 94.

The authorities, both State and national, hold that even if there was more land comprised within the call of White's patent than he had paid for, that the State alone could complain in a suit brought for the supplement of the price. A second patentee is not vested with the power of the State in this respect.

In White vs. Burnley, 20 Howard (U. S.), 247, the Supreme Court of the United States, speaking through Mr. Justice Catron, said:

"The grant contains two leagues or more of fast land; and for this reason it was insisted at the trial that it was fraudulent and void. But the court charged the jury to the contrary, with several qualifications. These we deem to have been useless, as our opinion is that a regular grant (that is, a completed title, made by those exercising the proper political power to grant lands) is not open to this objection, by an opposing claimant setting up a younger title; and we understand that on this principle the well considered case of Hancock vs. McKinney (7 Texas), and of Swift vs. Herrera (9 Texas) proceed. Such is the settled doctrine elsewhere (Overton vs. Campbell, 5 Haywood, Tenn. Rep). How far the government of Texas might interfere 'by due course of law,' that is, by suit in its name and behalf, is a question for that government to decide. Owen vs. Raines' Lessee (5 Hey. Tenn. Rep. 106) is to the effect that it can only be done by suit. To hold that this grant is *void* because the surveyor returned an excess in his survey, without any

evidence that the grantee participated in the matter, as is the case here, would be an alarming doctrine through a wide-spread portion of the United States. *No instance is recollected where the State has interfered by suit to reform a land patent for excess of quantity.* The consideration of more or less of excess, to constitute a *prima facie* case of fraud, would give a latitude of discretion to the judicial department over the executive and granting power inconsistent with the independence of the latter is this branch of administration. * * That a case of excess sufficiently gross could arise to justify a proceeding by suit on the part of the State of Texas, to reform a Spanish grant, we do not doubt. But the question here is not of reform, it is of original nullity. * * *It is probable that no actual survey was made on the ground,* and hence it happened the surveyor's certificate stated that more than one-half of the boundary shown on the plat was covered by water and not subject to grant. Of this matter, the surveyor and the commissioner, as the judge of land distribution, had jurisdiction; it was their duty to act justly between the government and the grantee. The commissioner acted by extending the title of possession, and this vested a full title in Morales. No one at that time had any right to complain if the government was content. *It has so far acquiesced and younger grantees are bound by that acquiescence.*"

Neither the State nor Federal courts have displayed much consideration for those who under the pretext of having discovered flaws in prior patents, have sought to enter and acquire the same land by a subsequent patent from the government.

In Davis vs. Fletcher, 11 An. 506, the Supreme Court of Louisiana repudiated a title similar to that set up by the defendants in this case. And in Cragin vs. Powell, 128 U. S. 691, the Supreme Court held that:

"One who acquires land knowing that it covers a portion of a tract claimed by another, will be held either not to mean to acquire the tract of the other, or will be considered to be watching for the accidental mistakes of others, and preparing to take advantage of them, and as such not entitled to receive aid from a court of equity."

It is admitted that Leovy had full knowledge of White's patent at the time he attempted to acquire a portion of the land covered by it from the State.

It will thus be seen that White's patent from the State of Louisiana conveyed a full, perfect and complete title to township 22 south, range 31 east, with certain designated exceptions, to-wit, the front lots and the 16th section.

Three years afterwards, without notice, without any hearing whatever, the defendant alleges that the State issued to him under and by virtue of Act No. 75, of 1880, patents to portions of this same land previously patented to White, and for which the State had received from him a valuable consideration. This construction and application of the act of Louisiana, approved April 7, 1880, is clearly violative of Sec. 10, Art. 1, of the Constitution of the United States, which pro-

vides, that "no State shall pass any law impairing the obligation of contracts." The obligation of White's contract is evidenced by his patent, and any law impairing that obligation violates the Constitution of the United States.

In Davis vs. Gray, 16 Wall., this court said:

That "the act of incorporation and the land grant here in question, were contracts, is too well settled in this court to require discussion. As such, they were within the protection of the clause of the United States which declares that no State shall pass any law impairing the obligation of contracts. When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances."

See also Pennoyer vs. McConnaughy, 140 U. S.

After all, a patent for land is nothing more or less than a sale by the government to a private individual or corporation, and is governed by the same rules which are applied to the contract of sale. It contains the three essential elements of a contract of sale—namely, the thing, that is, the land, the price and the consent. The consent of the government is manifested by the signature of its officers to the patent, and the consent of the grantee by his acceptance of the patent and the payment of the price. "In the sale of the public lands the government and its purchaser are governed by the same principles which apply to individual vendors and vendees." Dufresne vs. Haydel, 7 An. 662.

We, therefore, contend that the action of the State officers charged with the administration and alienation of the lands acquired from the United States under the Swamp Land Act, in issuing patents to Henry J. Leovy to certain sections embraced within township 22 south, range 31 east, which had been sold and patented to White three years previously, deprived him of his property without due process of law.

No notice, no hearing, no opportunity to defend the validity of his patent was given to the plaintiff in error by the officers of the State.

"Due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to defend, enforce and protect his rights. A hearing or an opportunity to be heard is absolutely essential."

Black's Constitutional Law, pp. 481, 212.

Pennoyer vs. Neff, 95 U. S. 715.

It is true that the State acts through its officers and agents by whom its powers are exercised, but it has been held, however, that:

"The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal prosection of the laws. Whoever, by virtue of public position under a State government, deprives another of property without due process of the law * * * violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power

his act is that of the State." (*Ex parte* Virginia, 100 U. S. 347; Pacific Gas Imp. Co. vs. Ellert, Mayor, et al., 64 Fed. Rep. 421; Chicago, B. & Q. R. Co., 166 U. S. 258.)

Before issuing patents to Leovy to portions of land contained in the township previously patented to White, the State should have (first) instituted suit to cancel its patent, and until such cancellation was obtained, it could not lawfully issue to another party any valid patents to the same land.

"It cannot be maintained that the State can issue two patents at different dates, to different parties, for the same land, so as to convey by the second patent a title superior to that acquired by the first patent." Chandler vs. Calumet & Hecla Mining Co., 149 U. S. 93 and 94.

Patents for land can only be impeached for fraud at the suit of the government.

Fields vs. Seabury, 19 How. 323; Smelting Co. vs. Kemp, 104 U. S. 657; Vance vs. Burbank, 101 U. S. 514.

If White obtained more land than he paid for, the State of Louisiana could have instituted a suit, instead of unlawfully issuing patents to Leovy, for a supplement of the price. Revised Civil Code of Louisiana, Arts. 2493, 2494, 2496, 2497, 2498; Phelps vs. Wilson, 16 La. 197; Stewart vs. Boyd, 15 An. 170.

A similar doctrine was held by this court in Lindsey vs. Hawes, 2 Black, 560 and 561, where the court said:

"We do not here deny the right of the government *which has sold land by the acre at a fixed price*, to make a new survey before it parts with the title, and *if there is any more land than was paid for*, to require the deficiency to be paid before it issues a patent. On that subject we decide nothing, because it is not necessary in this case. Lindsey's heirs were never notified of the additional number of acres found to be in the fraction, nor were they required or permitted to pay for this increase."

Even if White obtained five times more land (situated in this township 22), than he paid for this would not authorize the State to issue patents to other parties for the excess of any land contained in this township.

A patent is not revocable, impeachable or in any way affected by the fact that the patentee obtained much more land than he has paid for to the government. The Supreme Court of the United States has so decided in the following cases: "The patentee is not bound and concluded by the number of acres mentioned in the patent." Brown's Lessee vs. Clements, 3 How. 650, 665, 667 and 668.

Robinson vs. Moore, 4 McLean, p. 279; Newson vs. Pryor, 8 Wheat., p. 8.

The contention of Leovy that White has obtained a greater quantity of land than he paid for, is not supported by the evidence. The plat made by Surveyor Lewis, offered in evidence by defendant,

to show the nature, character and description of the *locus in quo*, discloses the remarkable fact that almost the whole of township 22 south, range 31 east, is covered by an extensive network of navigable streams, called bayous, passes, etc. Bradford testifies that there are not more than five hundred acres of land in the whole township, or less than one-seventh of the number paid for by White.

White testifies it is a partial township; has 12,000 or 15,000 acres; nine-tenths being water (R., p.—).

White bought land, not water. The State of Louisiana did not and could not sell the land situated in this township covered by navigable waters, or by beds of streams. Land & Fisheries Company vs. Gasquet, 45 An. 759.

In Hardin vs. Jordin, 140 U. S. 380, it was held that:

"It has been the practice of the government from its origin in disposing of the public lands *to measure the price* to be paid for them *by the quantity of upland granted*, no charge being made for the lands under the bed of the stream or other body of water."

The survey of G. F. Connelly, United States Deputy Surveyor, made in 1836, according to which these lands were approved to the State of Louisiana by the Secretary of Interior in 1852, and by which survey the lands were patented to the plaintiff, could not be questioned or impeached, nor could any subsequent survey be authorized or recognized by the State of Louisiana after she had parted with her title by issuing her patent to the plaintiff White. Connelly's plat and notes of survey form part of White's patent.

"When lands are granted according to an official plat of their survey, the plat, with its notes, lines, descriptions and landmarks becomes as much a part of the grant by which they are conveyed, and so far as limits are concerned, controls as much as if such descriptive features were written out on the face of the deed. The court cannot determine whether an official survey is erroneous."

Craigin vs. Powell, 128 U. S. 691.

In Russell vs. Maxwell, 158 U. S. 253, the court held that:

"A survey made by the proper officers of the United States, and confirmed by the Land Department, is not open to challenge by any collateral attack in the courts."

But it is contended that the land in this township was increased by alluvial deposits, which are not covered by White's patent. This we deny.

White's patent gave him all the land in township 22 south, range 31 east, with the exception of the front lots and section 16, whether they were formed by accretions or otherwise; and, as the owner of the land in this township and as the patentee of the State, he had a vested right in the accretions so formed by the water courses running through the township. A right to this accretion, as well as to all lands in the township, was vested in White under his patent.

In Municipality No. 2 vs. Orleans Cotton Press, 18 La. 122, it was held that:

"The right to alluvial formation or batture is a vested right, inherent in the property itself and forms an essential attribute of it, resulting from natural law in consequence of the local situation of the land to which it attaches."

The attempt of the State to deprive its patentee of all the land in the township, whether made by accretion or otherwise, is to deprive White of his property without due process of law.

In Jeffries vs. East Omaha Land Company, 134 U. S. 194, it was held that:

"*The patent passed the title* of the United States to lot 4, *not only as it was at the time of the survey* in 1851, *but as it was at the date of the patent* in 1855, so that the United States did not retain any interest in any accretion formed between the survey in 1851 and the date of the patent."

Paraphrasing this expression of opinion by this court, we say, the patent passed the title of the United States to township 22 south, range 31 east, not only as it was at the time of the survey in 1836, but as it was at the date of the patent to the State in 1852; and the patent from the State of Louisiana to White also passed the title for this same township as it was at the date thereof in 1890; so that neither the United States nor the State of Louisiana, its grantee, retained any interest whatever in the accretion formed between the date of the survey in 1836 and the date of the patent issued to White in 1890.

Leovy claims the ownership of certain sections in the township by virtue of patents issed by the State of Louisiana three years subsequent in date to the patent of White. Both he and White trace their title to the State of Louisiana, and the rule of law is well established that "where plaintiff and defendant both hold title from the State, the first purchase must prevail, if not successfully impeached." Cole vs. Thompson, 35 An. 1026; Bell vs. Hearne, 10 An. 515; 3 Rob. 295.

Leovy claims ownership of certain sections included within the township 22 south, range No. 31 east, previously patented to White by the State. It is a well recognized principle, both in logic as well as in law, that the greater includes the less, and the owner of a patent to a township takes all of the land within that township—every section therein, whether surveyed or unsurveyed, and no subsequent valid grant can be made by the State to any fractional portion thereof covered by the previous patent.

"*Priority of Patents—Evidence of Title.*—It is the almost universal rule of our courts to look to the elder patent in all questions of titles, and to give it effect. It is not for the court to look to any equitable claim on the general government which a third party might have in respect to lands conveyed to another person prior to the issuing of the patent.

"The elder patent must be impeached and vacated before any title can be set up under the younger one, and it cannot be impeached by parol proof. Letters patent are matters of record; they can alone be avoided in chancery by a writ of *scire facias* sued out on the part of the government or some one prosecuting in its name, or by a bill in chancery. The settled English practice is so, and we have no law or practice prescribing a different course. By an examination it will be found that the authorities, both English and American, speak of the case of two successive patents for the same thing, and that the second patent is void, though some differ as to which shall pursue the remedy to vacate either." Newell on Ejectment, Sec. 52, p. 468; Wirth vs. Brandon, 98 U. S. 118.

Respectfully submitted,

E. HOWARD McCALEB.

ADDENDA.

No. 75.] AN ACT

Entitled an act to readjust the State Land Office; appointment of a register; to fix his salary and the time and manner of paying said salary; to define the powers and prescribe the duties of the register; to fix the fees for certificates and patents, and disposition thereof; the price of lands and disposition of the proceeds; duties of the Auditor of Public Accounts, State Treasurer, Attorney General and the Governor; to provide for the payment of salary and expenses incurred in the State Land Office; to repeal all conflicting laws.

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That there shall be established, under the provisions of this act, an office for the sale of public lands donated to the State by Congress, which office shall be administered by a register; said office to be located at the seat of government of the State of Louisiana.

SEC. 2. *Be it further enacted, etc.*, That the Governor, by and with the consent of the Senate, shall appoint, under the provisions of this act, a register, who shall hold his office for the term of four years, whose annual salary shall be fifteen hundred dollars, in full compensation for his services as register, payable quarterly by the Treasurer of the State, on the warrant of the Auditor of Public Accounts, said salary to be paid out of the swamp land fund only. He shall take the oath prescribed by the Constitution and laws, and give bond in favor of and to be approved by the Governor of Louisiana, with one or more good and sufficient sureties, in the sum of five thousand dollars, conditioned for the faithful performance of the duties of his office, which bond so approved shall be filed by the register in the office of the Secretary of State.

SEC. 3. *Be it further enacted, etc.*, That it shall be the duty of the register to keep accounts of the sales of lands donated to the State, in well bound books, with the number of the certificate issued therefor, setting forth the section, parts of sections, township and range, district and parish, to whom and when sold, and for what price, and shall cause to be marked on the official plats or maps on file in his office the

number of certificate, which books and maps shall be preserved as official records. It shall be the duty of the said register to furnish annually to the Auditor of Public Accounts, on or before the twentieth day of December of each year, a descriptive list, by parish, of all lands sold during the preceding year, together with all data that may be afforded by his records.

SEC. 4. *Be it further enacted, etc.*, That all money arising from the sale of warrants or public land shall be paid by the purchaser to the State Treasurer, on the warrant of the Auditor of Public Accounts, whose duty it shall be to warrant at once on the Treasurer of the State to receive said money within forty-eight hours after the issuance of the same by the Auditor.

SEC. 5. *Be it further enacted, etc.*, That the Register of the State Land Office shall, on the sale of lands or warrants, describe the same in his order on the Treasurer of the State to receive the money for said lands, and in no case shall an entry be made upon the books, maps or other official record until the receipt of the Treasurer, also describing the land or warrants, has been submitted and filed in his office; a violation of this section shall be deemed a felony, and upon conviction the party offending shall pay a fine of five thousand dollars and be imprisoned for a term not exceeding ten nor less than two years. It shall be the duty of the Auditor of Public Accounts to transmit, within forty days after the expiration of each fiscal year, the report of the register, mentioned in section three of this act, to the assessor of the parish wherein the lands may be situated, in order that they may be assessed for taxes.

SEC. 6. *Be it further enacted, etc.*, That the register shall collect from parties purchasing lands the sum of twenty-five cents for each certificate of forty acres, the sum of fifty cents for each certificate of eighty acres, the sum of one dollar for each certificate of one hundred and sixty acres, and the sum of two dollars for each certificate of three hundred and twenty acres, and the sum of four dollars for each certificate of six hundred and forty acres, whenever such certificates are issued by him; and he shall charge and collect the sum of two dollars for each patent prepared by him and signed by the Governor; and that the fees charged and collected by the said register, under this act, shall be received by him for the use and benefit of the State, and shall be paid quarterly by the said register to the Treasurer, who shall credit the appropriate land fund of the State with the same.

SEC. 7. *Be it further enacted, etc.*, That the Treasurer, as receiver of the State Land Office, from and after the promulgation of this act, shall deliver to the purchaser or his agent, a receipt, which shall contain a correct description, by section, township and range, of the lands sold by the State, for which said Treasurer shall receive no extra compensation.

SEC. 8. *Be it further enacted, etc.*, That persons holding legally issued outstanding unlocated school, internal improvement or other State land warrants, or who have heretofore entered, located or purchased, or who may hereafter locate or purchase school or internal improvement warrants of the State of Louisiana, legally issued, and where the location, entry or purchase has been rejected by the United States, on land belonging to the general government, he or they shall have a right hereafter to locate said warrant on any lands belonging to the State.

SEC. 9. *Be it further enacted etc.*, That the Attorney General of the State of Louisiana shall give his opinion and counsel to the said register, whenever requested, in any matter pertaining to the duties or business of the said register's office.

SEC. 10. *Be it further enacted, etc.*, That the public lands, donated by Congress to the State of Louisiana, shall be subject to entry and sale, at the rate of seventy-five cents per acre for any number of acres; and any person making affidavit that he or she enters for his or her own use, and for the purpose of actual settlement and cultivation, and together with the said entry, he or she has not acquired from the State of Louisiana, under the provisions of this or any act graduating State land, more than one hundred and sixty acres, according to the established surveys, shall be allowed to enter one hundred and sixty acres at the rate of twelve and one-half cents per acre.

SEC. 11. *Be it further enacted, etc.*, That the public lands donated by Congress to the State of Louisiana, designated as sea marsh or prairie, subject to tidal overflow, so as to render them unfit for settlement and cultivation, shall be subject to entry and sale at the rate of twelve and a half cents per acre; *provided*, that satisfactory proof of said fact be filed with the Register of the State Land Office.

SEC. 12. *Be it further enacted, etc.*, That the Register of the State Land Office shall be authorized, and it shall be his duty to administer any oath or oaths which may be required by law in connection with the duties of his office.

SEC. 13. *Be it further enacted, etc.*, That all salaries and expenses incurred under the provisions of this act shall be paid by the Treasurer of the State of Louisiana, on the warrant of the Auditor of Public Accounts, out of the swamp land fund, and no other.

SEC. 14. *Be it further enacted, etc.*, That it shall be the duty of the Governor when applied to, to issue patents for all lands sold, on presentation of the Treasurer's receipt and for lands located by warrants, whenever he shall be satisfied that the same have been legally sold and located.

SEC. 15. *Be it further enacted, etc.*, That all laws and parts of laws in conflict with the provisions of this act be and the same are hereby repealed, and that this act shall take effect from and after its promulgation.

(Signed) R. N. OGDEN,
Speaker of the House of Representatives.

(Signed) S. D. McENERY,
Lieutenant Governor and President of the Senate.

Approved April 7, 1880.

(Signed) LOUIS A. WILTZ,
Governor of the State of Louisiana.

A true copy:

WILL A. STRONG,
Secretary of State.